No. 3192

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, and the substituted defendants therein, to-wit: ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, S. J. BELL, M. O'CONNELL and HARRY W. DAVIS, as Trustees, acting for and on behalf of said THE UNITED PROPERTIES COMPANY OF CALIFORNIA (a defunct corporation),

Plaintiffs in Error,

vs.

MARY ELLEN KIBBE,

Defendant in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

BRIEF FOR PLAINTIFFS IN ERROR.

R. P. HENSHALL,

Attorney for Plaintiffs in Error.

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Statement of the Case.

This was an action at law commenced in the state court, transferred by the defendant to the Federal

court, and there tried before the court without a jury. There is but little dispute as to the facts, most of them having been stipulated to in the court below. The action was for damages, with a breach of an agreement, and the judgment sought to be reviewed by the writ of error in this case directed that judgment be entered in favor of plaintiff and against defendant in the sum of $15,925, together with costs. The case is a companion case to two others, the decision of which will be controlled by these cases, Burkhardt v. United Properties Company, No. 15968, and Burkhardt v. United Properties Company, No. 15979, in which judgments were rendered for the plaintiffs therein in the sums of $111,024.50 and $118,849.75, respectively. Claims similar to the ones involved in the three cases for argument here aggregate something over a million dollars. Some cases are pending in the state courts, to which attention will presently be directed. The magnitude of the interests involved, therefore, justify a somewhat detailed presentation of the issues involved where the rights of third persons are so materially affected by the decision, as will be the case here. In this case the complaint, after alleging the corporate character of the United Properties Company, averred that on the 15th day of February, 1912, the defendant undertook and agreed in writing for a valuable consideration to deliver to the plaintiff and to the predecessor of plaintiff an instrument in writing, the legal effect of which is pleaded as follows:

It is averred that the defendant so undertook to deliver to

> "Ira M. Condit and Mary Ellen Kibby as joint owners or the survivor of them or order thirteen of its first mortgage and collateral trust, five per cent fifty year sinking fund gold bonds of the denomination of $1,000 each with all interest coupons attached, said bonds to be issued under and secured by a deed of trust dated January 1st, 1911, then in course of preparation made by the said defendant and so to be delivered under, as and when said bonds might be certified, issued and ready for delivery;"

The instrument itself is annexed to the complaint, marked Exhibit "A" and will be later referred to in detail. It is then alleged that on the 13th day of September, 1915, which would be three years lacking two days from the date when the instrument was made, the plaintiff demanded of the defendant that it execute and deliver to plaintiff the 13 first mortgage and collateral gold bonds, referred to, and that the defendant failed, refused and neglected to deliver them. It is further alleged that the bonds have never been executed and delivered at all, and that the deed of trust, referred to, has never been executed. It is also alleged at the time of the demand the plaintiff tendered to the defendant the agreement referred to and offered to surrender it to the defendant. Proceeding, the complaint alleges that no part of the sum of $13,000, referred to in the instrument, has been paid, and that had the bond referred to been executed, and delivered, it would have been of the value of $13,000, and that by

reason of the premises the plaintiff has been damaged in the sum of $13,000.

The answer sets forth several defenses. It first denies that on the 15th day of February, 1912, or at any time, the defendant made the agreement referred to. It denies that the bonds, had they been delivered, would have been of the value of $13,000 or of any other sum, and denies damage.

As a first affirmative defense the answer alleged that on or about the 16th day of February, 1911, certain of the officers of The United Properties Company issued to one R. G. Hanford an instrument similar in form and tenor to the instrument set out by plaintiff in the complaint; that this instrument was thereafter surrendered and re-issued in different forms, transferred by mean assignments until finally it passed into the possession of one R. B. Mott, who surrendered it, and that the instrument sued upon was issued in lieu thereof. It is then alleged that no resolution of the board of directors was ever passed authorizing the execution of the instrument sued on by plaintiff, or of any of the instruments issued to its predecessors, and it is further alleged that no meeting of the stockholders was ever called or held at which any vote was taken authorizing the issuance or execution of said instrument sued on by plaintiff, or of any of the instruments which preceded it. It is further alleged that a bonded indebtedness was never created by the written assent of the stockholders of The United Properties Company holding two-thirds of its cap-

ital stock or, indeed, any part of its capital stock, and that no attempt had ever been made by the directors, trustees or officers to comply with the provisions of Section 359 of the Civil Code of the State of California relating to the creation or increase of the bonded indebtedness, or indebtedness of any kind. In this defense it is further alleged that the said R. G. Hanford at the time the instrument first referred to was issued was a stockholder of the corporation and one of its board of directors, anud that he had notice and knowledge of all of the facts herein recited. The other defenses set forth in the answer are that it is barred by the provisions of Sections 359, 338 and 339 of the Code of Civil Procedure of the State of California. Upon these issues and in the light of the facts hereinafter to be developed, the following issues of law arise for determination:

1st. Does the complaint state a cause of action, that is, assuming, as we must, that an agreement has been plead, does the complaint show facts disclosing a breach of this agreement?

2nd. Was this agreement ever made by the defendant?

3rd. If not originally made, was it ever ratified or approved in any way so as to give plaintiff a cause of action upon it?

4th. Is there any proof in any event that the plaintiff has been damaged in any sum of money whatever?

5th. Is the cause of action barred by any statute of limitations?

As the first question arises solely upon the complaint, we have deemed it advisable to postpone a statement of the facts in detail until we arrive at that point in the argument where these facts are necessary to be stated to consider the legal questions there arising, and in accordance with the rules of the court, we now present the Assignment of Errors:

Assignment of Errors.

Now come the substituted defendants herein, Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, trustees of the original defendant, The United Properties Company of California, who were directors in office at the time said The United Properties Company of California, original defendant herein, forfeited its charter for nonpayment of taxes, and who are made by law the trustees thereof, and acting for and on behalf of said The United Properties Company of California, and as its trustees, and not otherwise, by their attorney, assign errors in the decision and judgment and in the proceedings herein, as follows, to wit:

I.

The decision and order of said District Court holding and adjudging herein that the complaint of plaintiff herein, in the original action above en-

titled, stated facts sufficient to constitute a cause of action, and holding that said complaint stated facts sufficient to constitute a cause of action, was and is error and is here assigned as error.

II.

The decision and holding of said District Court that the complaint on file in the above-entitled action need contain no allegation that the bonds referred to in said complaint were certified and were ever ready for delivery, or that an unreasonable time had elapsed for their delivery, was and is error, and is here assigned as error.

III.

The holding and decision of the court herein to the effect that the original defendant, The United Properties Company of California, had ever made or entered into the contract referred to in said complaint, was and is error, and is here assigned as error.

IV.

The ruling and decision of the court herein to the effect that a bonded indebtedness of a corporation, to wit, said The United Properties Company of California, can be created either under the laws of Delaware or under the laws of California, without any resolution on the part of the directors authorizing it to be created, was and is error, and is here assigned as error.

V.

The decision of the court herein that the plaintiffs herein, who purchased the instruments referred to in the complaint herein from R. G. Hanford, and who, as the evidence shows, made an offer to the company at the time he accepted the said instruments and assigned the same to the plaintiffs herein, such instruments not being negotiable, were not bound by and are not chargeable with knowledge and notice of the fact that Section 359 of the Civil Code of the State of California had not been complied with, but are entitled to recover notwithstanding such compliance, was and is error, and is here assigned as error.

VI.

The decision of the court herein that the instrument in question, which instruments are contracts to create a contract, need not be executed with the same formality with which the contract referred to in said instrument would be required to be executed, was and is here assigned as error.

VII.

The decision of the court herein that the rights and remedies of the plaintiffs herein, if they have any such rights and remedies, are not in the form of an action for breach of a special contract against the corporation, but are upon a general assumpsit against the corporation or against R. G. Hanford, was and is error, and is here assigned as error.

VIII.

The order and judgment of the court herein, directing that judgment be entered in favor of the plaintiffs, and each of them, was and is error, and is here assigned as error.

IX.

The failure and refusal of the court herein to order and enter judgment for the defendant upon the permitted and stipulated facts, found in the record herein, was and is error, and is here assigned as error.

X.

The ruling and holding of the trial court, admitting the minutes of February 24, 1911, purporting to be a record of a corporate meeting of The United Properties Company of California, held on that date, was and is error, and is here assigned as error,—the same being specified in defendant's bill of exceptions herein as Exception No. 1.

XI.

The ruling and holding of the court herein, permitting in evidence, over the objection of defendant, the minutes of the stockholders' meeting of December 5, 1911, purporting to be a record of a meeting of the stockholders of the defendant, The United Properties Company, as of that date, was and is error and is here assigned as error,—the same being designated in said bill of exceptions as defendant's Exception No. 2.

XII.

The ruling and holding of the trial court herein that the plaintiffs herein were entitled to a judgment against the defendant, The United Properties Company of California, in any sum of money whatever, based upon the alleged cause of action set forth in said complaint, was and is error, and is here assigned as error.

Wherefore, these defendants pray that the order and judgment of said District Court of the United States, for the Northern District of California, Second Division, be reversed and that they have such other and further relief in the premises, based upon this assignment of errors, as shall seem meet.

Brief of the Argument.

I.

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

A summary of the complaint has already been presented and it only remains necessary to quote Exhibit "A", which reads as follows:

"Bond Certificate

Number 660.

For First Mortgage and Collateral Trust Five Per Cent. Number	Par Value of Bonds $13,000.00 Fifty-Year Sinking Fund Gold Bonds

The United Properties Company of California.

The United Properties Company of California, a corporation organized and existing un-

der the laws of the State of Delaware, for value received, promises to deliver to Ira M. Condit and Mary Ellen Kibby as joint owners, or the survivor of them, or order, upon the surrender of this certificate duly endorsed, thirteen of its 'First Mortgage and Collateral Trust Five Per Cent Fifty Year Sinking Fund Gold Bonds', of the denomination of one thousand dollars ($1,000.00), each with all interest coupons thereto attached, said bonds to be issued under and secured by the Deed of Trust in preparation dated January 1, 1911, made by said The United Properties Company of California, and to be delivered hereunder as and when the said bonds may be certified and ready for delivery.

In witness whereof, said The United Properties Company of California has hereunto caused its corporate name to be signed and its corporate seal to be affixed by its President or one of the Vice-Presidents and Treasurer or Assistant Treasurer thereunto duly authorized, this 15th day of February, 1912.

The United Properties Company
of California.
W. K. Alberger,
Vice-President.
A. G. Raycraft,
Asst. Treasurer."

Endorsed on Certificate:

"Interest from Jan. 1st to July 1st, 1911, amounting to $325.00, paid July 1st, 1911, $25.00 Nov. 18, 1911, $300.

A. G. Raycraft,
Asst. Treasurer.

"Interest from July 1st, 1911, to Jan. 1st, 1912, amounting to $325.00, paid Jan. 2nd, 1912.

A. G. Raycraft,
Asst. Treasurer.

"Interest from Jan. 1st, 1912, to July 1st, 1912, amounting to $325.00, paid July 1st, 1912.

A. G. Raycraft,
Asst. Treasurer.

"Interest from July 1st, 1912, to Jan. 1st, 1913, amounting to $325.00, paid January 2nd, 1912.

A. G. Raycraft,
Asst. Treasurer.

"For value received .... hereby sell, assign and transfer unto .... the within Bond Certificate for .... bonds of the within named company, represented by the said Bond Certificate, and do hereby irrevocably constitute and appoint .... attorney to transfer the said Bond Certificate, or to exchange the same for the bonds represented thereby, with the full power of substitution in the premises.

Dated ...., 19.......

....

In the presence of

...."

The language of this instrument is very peculiar, and is unlike anything to which our attention has been directed. It contains a promise that the defendant will deliver, but when it will so deliver is not stated, to the persons therein named, 13 of its First Mortgage and Collateral Trust Five Per Cent Fifty Year Sinking Fund Gold Bonds of the denomination of $1000 each, with coupons attached. Beyond this, and except in a respect presently to be noted, the bonds are not identified. It is stated, however, that these bonds are to be issued under and secured by the "deed of trust in preparation dated

January 1, 1911", the instrument referred to being dated the 15th day of April, 1912. This instrument, it is stated, is made by the defendant and the bonds referred to "are to be delivered hereunder as and when the said bonds may be certified and ready for delivery". The terms and conditions of this deed of trust are nowhere stated, nor are any of the terms and conditions of the bonds stated other than that they are to be secured by a deed of trust. From the recital that they are first mortgage, it must be presumed that they would be first mortgage bonds. From the use of the words "five per cent" we presume the rate of interest is five per cent. From the use of "sinking fund gold bonds" it is to be inferred that there is to be a sinking fund and that the bonds are to be payable in gold, and from the expression "fifty year" we can infer that the principal would fall due fifty years from date. But in all other respects the nature and character of these bonds and of the deed of trust referred to are nowhere stated.

A multitude of questions in this regard at once suggest themselves. On what property were these bonds to be a lien? How often is interest to be paid? What happens if interest is not paid? Who is to be the trustee in whose name the legal title is to rest? What are the nature, terms and conditions of the sinking fund referred to?

Other questions will occur to the mind, indicating the lack of precision, and many uncertainties found in this instrument. These questions are mentioned by us merely to exemplify the character of the ob-

jections going to the sufficiency of the complaint, which are as follows:

(1) If the promise set forth in this instrument is a promise of anything, it is a promise to deliver said First Mortgage and Collateral Five Per Cent Fifty Year Sinking Fund Gold Bonds under the deed of trust designated and they are "to be delivered hereunder as and when the said bonds may be certified and ready for delivery". The promise to deliver bonds, which is not said to be upon any definite date, is agreed to be made "as and when the said bonds may be certified and ready for delivery". It may be conceded, of course, that the corporation could not refuse to execute the deed of trust and could not indefinitely postpone a delivery of the bonds, but on the other hand, it was not contemplated by the parties that an immediate delivery should be had, for they were to be delivered only when they were certified and ready for delivery. There is no allegation that these bonds were ever certified or were ever ready for delivery, so that the failure to deliver them was not due to any default after they were certified or ready for delivery, and the absence of any allegation that they were certified or were ready for delivery renders the complaint totally insufficient as a statement of a cause of action so far as this aspect of the case is concerned.

(2) The next question then arises: When did the company default in its obligations to deliver

these bonds? The instrument in this case was executed on the 15th day of February, 1912, and the deed of trust, referred to as in preparation, was dated January 1, 1911. The defendant evidently was not in default a day after the 15th day of February, 1912. Was it in default on January 1, 1912? It could not have been in default on January 1, 1912, though interest apparently was paid from that date, because it was issued later. But was it in default on July 1, 1912, when the plaintiff accepted interest to January 1, 1913? Manifestly it was not in default on January 1, 1913, because plaintiff had accepted interest until that date. As it could not have been in default on January 1, 1913, whether or not it was in default afterwards depends upon a variety of conditions and circumstances, none of which, however, is stated in the complaint. The rule of pleading, of course, is that it must be construed most strongly against the pleader. And here not alone is there an absence of any allegation showing the company to have been in default, but the complaint, by showing that plaintiff accepted interest up to January 1, 1913, in a measure excludes the idea that up to that date it could have been in default. So far, therefore, as the complaint is concerned,—except with respect to the fact that it does allege that later a demand was made, which was refused,—there is nothing in these allegations to show that a cause of action was stated.

(3) What will doubtless be contended is that what is meant by this clause of the contract is that

the defendant had a reasonable time within which to perform the act agreed upon. Here, however, other differences arise. If this be so, then the complaint ought to allege facts from which the court can conclude, as a matter of law, that the time has elapsed and is unreasonable. If the complaint alleged that from and after a certain date an unreasonable time had elapsed and that the defendant had failed within that reasonable time to perform its obligation, a different question would have been presented. And that some time had to elapse before the bonds were to be delivered is apparent from the instrument itself, which refers to them as being secured by a deed of trust in preparation, and by the fact that they were to be delivered as and when they were certified and ready for delivery.

(4) We now reach the allegation that on the 13th day of September, 1915, the delivery of the bonds was demanded and refused. It must be remembered, however, that they were to be delivered only as and when they were certified and ready for delivery. There is no allegation, as we have pointed out, that they were then certified and ready for delivery, and there is no allegation that they ought to have been certified and ready for delivery by that time. The refusal to deliver them may, therefore, not have been improper, but the very thing which the defendant ought to have done, and some force is lent to this objection by the fact that the complaint does allege that the deed of trust was not prepared. If the deed of trust was not prepared, of

course the refusal to deliver the bonds was justifiable unless the failure to prepare the deed of trust was wrongful. There is no allegation whatever upon the subject in regard to the deed of trust other than that it was not executed. There is no charge made that it ought to have been executed by a given time; there is no allegation that there was no reason why it should not have been executed; we are left wholly to speculation and conjecture as to when this deed of trust was to be completed, and we are left to a presumption in a complaint that because a certain period of time had elapsed, during a part of which at least it must be conceded the failure to execute and deliver was legal, the whole time nevertheless was unreasonable and unlawful. How a presumption of an allegation can exist in a complaint, in view of the rule that pleadings must be construed against the pleader, is not clear to us.

(5) And here we come back to the vice in this allegation. The complaint shows that the deed of trust was not executed, that interest was paid on the instrument up to January 1, 1913. If the deed of trust was not executed it follows, as we have already stated, that the failure to deliver the bonds was legal. The cause of action in that respect is not stated, and as there is no allegation with respect to the reason why the deed of trust was not executed, there is no cause of action stated in any aspect. Indeed, it is very clear that the complaint counts upon a refusal to certify and deliver bonds. There is no allegation showing that this delivery

was improper. It does not count upon a refusal or failure to execute a deed of trust, and this being so, the allegation with respect to the nonexecution of the deed of trust does not aid the plaintiff.

(6) None of these points is technical, as at first blush may appear to be the case. A correct answer to the questions above propounded is necessary in order to determine when the cause of action arose, for from the moment when the cause of action arose the statute of limitations began to run, but not before, and how can the court fix the date when the statute of limitations commenced to run without some allegation that will enable it to ascertain when the cause of action arose. For example: suppose six or seven years had elapsed. It is very plain that the breach of the agreement did not occur the day after the instrument was signed; the statute of limitations did not commence to run on that date. But if it did not commence to run on that day, when did it commence to run, and if a period of six or seven years had elapsed it could not be told whether the cause of action was or was not barred without knowing some specific date when the statute commenced to run. The complaint in the present case is barren of any allegation from which anybody can infer when the cause of action arose, or when the statute began to run, and in consequence, therefore, it is open to the general objections specified.

(7) Aside from the foregoing objections there are two others that ought briefly to be mentioned here, but which will receive some discussion post, as follows:

(a) Before a contract can be the foundation of an action, even an action at law, it must be sufficiently definite and certain within the rules of law. The present contract is a promise to deliver, upon the surrender of the certificate, 13 first mortgage bonds of the denomination of $1000 each, with interest coupons attached, which were to be secured by deed of trust in course of preparation. The uncertainties, however, are patent, and are such as amount to the equivalent of no contract at all.

What, for example, if any, remedy would be available to the holder of the bonds in the event of default in the payment of interest? Could he sue at once, or would he have to wait until the principal fell due? What would be the duties of the trustee? Would the trustee be entitled to compensation under any circumstances? Would the trust deed in due and legal form, specified in the contract relied upon, have included a provision for the substitution and replacement of securities from time to time? Who is to collect the income from the pledged securities? What, if any, limitations would there be on the right of the bondholders to maintain judicial proceedings? How would the pledged property be sold in the event of default? These circumstances, therefore, lead us to the belief that under the au-

thorities this contract was void for lack of certainty to such an extent that it could not be the foundation of any right in a court of justice.

See:

National Elec. Signaling Co. v. Fessenden, 207 Fed. 915; 125 C. C. A. 363;

Jones v. Vance Shoe Co., 115 Fed. 707; 53 C. C. A. 289;

Baurman v. Binzen, 16 N. Y. S. 342;

Elks v. North State L. Ins. Co., 159 N. C. 619; 75 S. E. 808;

Prior v. Hilton, etc. Co., 141 Ga. 117; 80 S. E. 559.

In this regard it is to be observed that this agreement is distinctly,—if it is any agreement at all,—an agreement to deliver personal property. *It is not an agreement evidencing a money obligation to be satisfied, however, by the delivery of personal property.* In that event it is well settled law that if the personal property is not delivered the promise is regarded as a promise to pay money. For example: If this had been a promise to pay $50,000, to be delivered in bonds, then the failure to deliver the bonds would give rise to a perfect cause of action for the recovery of the money.

See:

Beckwith v. Sheldon, 168 Cal. 742.

This, however, is a specific obligation, for instance, to deliver personal property and the kind of

personal property, the nature, extent and character of the personal property should, in consequence, be specified with precision in order to give rise to the pledge.

It has been contended that the offer when accepted was an authorization, but the authority has not been pointed out by which any officer could lawfully issue a certificate promising to deliver first mortgage and collateral trust five per cent fifty-year sinking fund gold bonds to be secured either by a mortgage or a trust deed, apparently, the terms of which are specified in no regard whatsoever. Can anyone say what it is that the certificate pledges to set aside as security for the bonds? Is it all the property of the corporation, or is it only some of the property which has been called worthless? In the event of default, how were the proceeds of this property to be obtained and applied to the fulfillment of the promises? That this vague, uncertain thing was that which was authorized is unthinkable.

II.

THE CONTRACT SUED ON WAS NEVER MADE BY DEFENDANT.

It is admitted that it was never authorized by its board of directors unless its authorization was effected by the acceptance of the Hanford proposition, Nos. 1 and 2. But the acceptance of these propositions cannot be treated as an authorization for the issuance of the instruments sued upon. Mr.

Hanford offered to give to the company certain stocks and bonds of other companies in consideration that certain stocks and bonds of the defendant be issued to him; and he provided in his agreement that in the event that the "*permanent*" bonds and debentures he designated were not available that he would accept "in lieu thereof certificates for such bonds *authorized* and issued by you". The position of Mr. Hanford in this respect was quite clear. He presupposed, of course, a resolution creating a bonded indebtedness. If, when the corporation had set in motion the machinery for the creation of such bonded indebtedness, it did not have within the time specified,—which was thirty days,—the "permanent" first mortgage bonds, then Mr. Hanford, in that event, agreed to accept certificates for such bonds which could subsequently be exchanged for the bonds when they were issued and ready for delivery. This, of course, was Mr. Hanford's proposition to the company and this was the proposition that was accepted.

Now, it is admitted in the present case, that no steps of any kind were ever taken towards the creation of the bonded indebtedness. The certificates issued, while calling for the exchange of the permanent bonds which were to be issued under a bonded indebtedness then created, were not the certificates referred to in the Hanford offer, for the reason that no bonded indebtedness had been created to which they could apply. *They were not alone,*

therefore, not the certificates referred to in the Hanford offer, but they were not authorized by the company to be issued at all, under any circumstances. If we suppose that the bonded indebtedness had been created by resolution of the board of directors; that the permanent bonds were not issued and ready for delivery; that Mr. Hanford had then offered stocks and bonds for exchange for these permanent bonds and had agreed to accept temporary certificates, subsequently to be exchanged for the permanent bonds, we will have a case which would be analogous to the case alleged in the complaint. For the corporation having taken the step to create the bonded indebtedness could, of course, promise that it would deliver the bonds when the bonds were ready for delivery and could give certificates for such bonds to be exchanged for them subsequently; and for a breach of such a promise contained in the certificate it would be liable to the holder in damages or, for that matter, it might have been compellable specifically to deliver the bonds. But this was not the case proved at the trial. For when no act leading toward the creation of a bonded indebtedness had been taken, the issuance of a certificate in the name of the corporation without any resolution to that effect, was not alone not the certificate referred to in the offer of Mr. Hanford and which alone the corporation was authorized to issue, but it was, in fact, not the act of the corporation, for there was no bonded debt to which the certificate could apply.

We may dismiss from this case at once all question of the necessity for any action on the part of the stockholders leading toward the creation of a bonded debt. Under the laws of Delaware the consent of the stockholders is not necessary to the creation of a bonded debt and the Supreme Court of this state has held that a bonded debt created without the consent of the stockholders is not void. All such questions we allude to in passing only, to clear the atmosphere in this case.

A bonded debt, however, cannot be created under the laws of Delaware, nor in California, nor in any other state, so far as we are aware, without a resolution on the part of the directors authorizing it to be created. Now, in the instant case, it is admitted that no resolution of any kind was ever passed authorizing the creation of a bonded debt. The certificate in question, therefore, being a certificate by the corporation, having relation to a bonded debt which was not created, was void; for surely the corporation could not promise something with respect to a bonded debt when it had not created it. It is settled law that, except in those instances in which the law of estoppel applies, a corporation must act by resolution of its board of directors.

We have then here two points: First, the bonded debt, or the creation of the bonded debt, to which this certificate applies, was never authorized. To make this point clear, suppose a bond had been issued in the name of the corporation, but no action

on the part of the board of directors authorizing the issuance of such bond had been taken. Obviously, it could not bind the corporation. Now, here, if we assume the certificate sued upon (which assumption is erroneous) to have been authorized by the board of directors, there was no bonded indebtedness created to which it could apply.

But, secondly, the certificate in question was not the certificate which the corporation itself was authorized to issue; for that certificate contemplated, as we have shown, the previous creation of a bonded debt, and that in lieu of the permanent First Mortgage Bonds to be issued thereunder, there should be issued a certificate which should provide that they should be exchangeable for First Mortgage Bonds as and when they were ready for delivery. Both of these conditions are lacking in the present instance, and, in consequence, the promise is not the act of the corporation.

III.

NO RATIFICATION OR ESTOPPEL HAS BEEN SHOWN WHICH WOULD GIVE RISE TO A RIGHT OF ACTION IN PLAINTIFF.

Mr. Hanford made the offers in question to the directors. Mr. Hanford was one of the founders of the company and one of its directors. The consideration moved from Mr. Hanford to The United Properties Company of California, and the certificates in question were issued to him. They can

have no other or greater validity than they would have if they were in his possession and if he were now suing the company—for they are not negotiable. The consideration passing between Mr. Hanford and the present owners has not been shown, nor would it make any difference to the law of the case whether this latter consideration were valuable or not. Mr. Hanford knew, as one of the directors, that the bonded indebtedness had never been created, and he therefore was in nowise deceived or misled by the issuance to him of the certificates in question. This is not the case of a person dealing with a corporation, unaware of the facts under such circumstances as that the law will estop the corporation from denying its representations. Here, in point of fact, Mr. Hanford knew, for he was one of the organizers of the company and we understand counsel admits that he had actual knowledge that Section 359 had not been complied with.

It follows, therefore, that this is simply a case of a person accepting the apparent obligation of the company, having actual knowledge and notice that it was not, in fact, the obligation of the company. All question of estoppel at once vanishes out of the case. Here we have an explanation of the situation, or at least we are given sufficient light in this case, to understand why this singular situation has arisen. It appears from the testimony of Mr. Tevis that the offers made by Mr. Hanford—Nos.

1 and 2—were made by him as part of a general plan or scheme. Such, indeed, is the fact; for they were made pursuant to a pre-merger agreement between F. M. Smith and W. S. Tevis. See the agreement annexed to the stipulated facts wherein time is given Smith to perform his part of the agreement.

The company referred to in this agreement was The United Properties Company, and it was formed to carry out this understanding. But it is in the admitted facts that Mr. Smith failed to make to Mr. Hanford, or to The United Properties Company, a delivery of the stocks and bonds promised by him. An interesting question here arises. As it was clearly the intention of Smith and Hanford that there should be conveyed to The United Properties Company certain stocks and bonds, for which certain certificates of that company should be issued to them, and as it is an admitted fact that the requisite considerations were never delivered to The United Properties Company, can it be estopped from denying its liability upon the instrument issued upon the face of these promises unperformed?

In this connection it is important to note that the offer of Hanford (Transcript, p. 69) reads in part, "For and in exchange for all of said stock, and *as the consideration for the delivery thereof to you,* I hereby offer to accept from you", etc. If this offer was accepted, then it was accepted, as the offer

reads, *on the condition of the delivery of the stock.* And as the delivery was never made, as is admitted, the condition of the alleged acceptance was never fulfilled, and for this reason alone the acceptance would be of no binding value. As the plaintiff stands in the shoes of Hanford, who had full knowledge of this vice in the agreement, was in fact responsible for it, he has no better right than Hanford, and it certainly cannot be claimed that Hanford, not having performed, could have recovered in such an action.

Further, as the authorization, if any there was, was coupled with a conditional acceptance, the condition of which was never fulfilled, it is clear that the authorization was never an absolute one. In this respect as well, then, it is clear that the act done was not the act of the corporation.

There are, however, still other objections to the maintenance of this suit. The instrument sued on is a promise to create a mortgage and it is sued upon as such. The complaint counts upon a breach of a contract to create a mortgage. A contract to create another contract must at least be executed with the same formality as the contract itself. It would be a singular thing to enforce a contract to create a contract executed with less formality than the contract itself would require if executed. In California a mortgage, not authorized by the directors, is void.

See:

Curtin v. Salmon River, etc., 130 Cal. 345.

And a contract to create a mortgage not authorized by the directors must be void. We have the exact case here. It is admitted that the mortgage was never created and was never authorized by the directors, and we think that it has been practically admitted, or if not admitted, shown, that the instrument sued on was never authorized by the directors. No action, therefore, under the case of Curtin v. Salmon River, etc., can be maintained upon it. This case was approved by the Supreme Court of the United States in Williams v. Gaylord, 186 U. S. 164.

The case of Curtin v. Salmon River, etc., also disposes of counsel's contention with respect to the ratification by the stockholders; for in that case it was held that as the mortgage had never been authorized by the directors it could not be ratified by the stockholders, nor could they authorize it. *The alleged resolutions, therefore, by the stockholders, introduced in this case, purporting to ratify everything that had been done, become of no moment.* The doctrine of Curtin v. Salmon River, etc., is reaffirmed in Riley v. Campbell, 134 Cal. 175.

See:

Blair v. Brownstone Oil, etc., 168 Cal. 632.

There is a special reason in California why this doctrine is so. A mortgage upon real property can

only be created by certain formalities which must be pursued in writing.

See the case of Blood v. La Serena L. & W. Co., 113 Cal. 221, where the whole subject is discussed. The authority of the president and secretary to execute it on behalf of the corporation must be given them in writing (Id.). Of course, therefore, an agreement to execute a mortgage must be executed with the same formality and must be in writing. And here we have disposed of counsel's plea of ratification. The case of Blood v. La Serena L. & W. Co., 113 Cal. 221, is a complete answer to this point, for it holds that a ratification, in order to be valid, must be attended with the same formalities as the authorization. As this was the case of a note and mortgage held invalid because unauthorized by the directors, it is exactly in point here for the contract to create a mortgage being required to be in writing the ratification of it must, under the case cited, have been in writing also.

IV.

THERE IS NO PROOF THAT PLAINTIFF HAS BEEN DAMAGED IN ANY SUM OF MONEY WHATSOEVER.

It has been pointed out that the promise alleged in the complaint is not one to pay a certain sum of money, to be delivered in bonds. Then it might be claimed that the failure to deliver the bonds would give rise to a cause of action for the re-

covery of the money. The obligation here alleged is to deliver personal property, but in answer to the question what personal property was to be delivered, it can only be said that its nature, extent and character is not specified with precision, but with the utmost vagueness. Within the loose terms of the allegations of the complaint, the court might make a dozen surmises in this respect which might with equal reason range in kind from the most worthless security to one of the first class. The plaintiff has alleged that he was promised the delivery of something, but since the terms of the alleged agreement are so vague it is impossible to ascertain what he was promised, if anything, it is also impossible to know its value, if any it had, and the resulting damage to plaintiff for its nondelivery.

In conclusion, the plaintiff is not without a remedy here; but his remedy is the same remedy of which R. G. Hanford could avail himself were he suing. It is a plain one. In those instances where a corporation has received a consideration from a third person, but has not made the alleged promise or where for some reason the promise is void, the law relegates the injured party to an action on a quantum meruit wherein he may establish his rights. Thus, in the case of Curtin v. Salmon River, etc., 130 Cal. 345, it is noted that

> "whether defendant would be estopped from contesting the claim of the plaintiff to recover the moneys advanced to it by him is not involved herein."

The court rendered its decision there, as we ask it here to render its decision, holding that the action could not be maintained to recover damages for the breach of the promise alleged because the defendant had never promised. So in Smith v. Pacific Vinegar and Pickle Works, 145 Cal. 352, a contract formally entered into by the corporation with its president was held void by reason of the trust relation existing between the corporation and its president. The court there noted again that while the action of special assumpsit could not be maintained, the party parting with the consideration might bring an action against the corporation on quantum meruit to recover back the consideration he parted with.

So, in this case, whatever decision the court makes, we are ready to concede should be made without prejudice to any claim on behalf of Mr. Hanford, or any of the persons to whom he has disposed of the certificates, whether for value or by way of gift, to recover in general assumpsit the value of the consideration which they have parted with to the company. But they cannot recover damages against the company for breach of a special contract which the company never made.

Dated, San Francisco,
April 25, 1921.

Respectfully submitted,

R. P. Henshall,
Attorney for Plaintiffs in Error.

Appendix

IT WOULD APPEAR AS IF THE PROMISE ALLEGED WAS SECURED BY A CERTAIN MORTGAGE LIEN ON CERTAIN PROPERTY, AND IN CONSEQUENCE THE PLAINTIFF IS PROHIBITED FROM BRINGING THE PRESENT ACTION BY SECTION 726, CODE OF CIVIL PROCEDURE.

In the main brief we have inadvertently neglected to direct the attention of the Court to two cases growing out of the same series of transactions as the case at bar. It is only fair to the Court that these cases should be before it. They are Beal v. Smith et al., 31 C. A. D. 649, and Beal v. The United Properties Company of California et al., 31 C. A. D. 656. In the last mentioned case Judge Nourse made the following statement:

> "There is another phase of the case which has been purposely omitted from the foregoing discussion because it is not presented in any of the voluminous briefs which have been filed on this appeal, and that is that plaintiff, without seeking specific performance, could have treated the oral contract as a direct obligation to pay money, sued on it as such, and had his lien to aid in enforcing the judgment. (Marshall v. Ferguson, 23 Cal. 65, 69; Cummings v. Dudley, 60 Cal. 383, 385; Beckwith v. Sheldon, 168 Cal. 742, 746.) And 'where a party agrees to give a mortgage or lien on property, or imperfectly attempts to execute such mortgage or lien, upon a valuable consideration received, a court of equity, upon a proper showing, will create a specific lien on the property intended to be hypothecated, and enforce the same'. (Beckwith

> v. Sheldon, supra, 747). But equity will grant such relief only as incidental to the enforcement of the original obligation. 'A lien is extinguished by the lapse of the time within which * * * an action can be brought upon the principal obligation.' (Civil Code, sec. 2911.) Thus, where the principal obligation is unenforceable because barred by the statute of limitations and the facts alleged do not support the conclusion that a resulting trust has arisen, equity cannot declare or enforce a lien. The principal obligation was the oral contract for the exchange of the securities, action upon which was barred in two years after it accrued, and this being so, whatever right plaintiff had to an equitable lien growing out of the oral contract was lost before this action was commenced. (San Jose etc. Bank v. Bank of Madera, 144 Cal. 574, 577; Newhall v. Sherman, Clay & Co., 124 Cal. 509, 512.)"

In the case at bar the alleged contract is in writing, but we are unable to conceive why the above reasoning should not with equal force lead to the conclusion that the present action should have been one to foreclose an equitable lien.

Such an action is not one of specific enforcement of a contract to create a certain, specific mortgage, and it is not necessary to apply to it, nor is it the law to apply to it, the stringent rules of certainty peculiar to the law of specific enforcement, where the purpose is to set in operation a contract with its terms, conditions and covenants in all their details. The lien is simply for the purpose of doing equity, and is described sufficiently for the purpose of fore-

closure where the property to which it attaches is clearly pointed out.

> 11 Am. & Eng. Ency. of Law, p. 143 and note 3;
>
> Love v. Sierra etc., 32 Cal. 639, 654;
>
> Beckwith v. Sheldon, 168 Cal. 746, 747;
>
> 3 Pomeroy's Equity, Secs. 1234, 1235.

From the complaint it would seem evident that the security of a first mortgage, or of a trust deed of that nature, was intended; that such a deed was in preparation on January 1, 1911, and that the bonds were to be issued under it; it is alleged that payment of the principal and interest of the bonds was demanded, and it does not appear but that there is in existence an instrument which may serve the purpose of identifying the property burdened with the lien. It is true that the statement is only that the deed of trust was in preparation, but, since the instrument alleged promises a mortgage security there remains only the necessity of identifying the property to which the lien attaches, and for that purpose it is not necessary that the deed of trust be executed; it would be sufficient if it were only such a general statement as "all the property", or if it were only a schedule identifying certain property, though apart from the promise of a mortgage it might have no legal effect whatsoever. The plaintiff has alleged sufficient facts to raise grave doubt that he is suing on an unsecured promise. That the trust deed stated to be in preparation may be referred to is settled by the familiar rule

that evidence of extrinsic facts is allowed to identify the description of property in a written contract. (Joyce v. Tomasini, 168 Cal. 240.)

As a consequence of this situation, it would appear that the plaintiff's own complaint points him to an exclusive remedy under Section 726, Code of Civil Procedure.

The right to a personal action to recover a debt secured by a mortgage is inhibited by Section 726, Code of Civil Procedure.

Hibernia Sav. & Loan Soc. v. Thornton, 123 Cal. 62;

Toby v. Oregon etc., 98 Cal. 494.

Dated San Francisco,
May 2, 1921.

Respectfully submitted,

R. P. Henshall,
Attorney for Plaintiffs in Error.

Received a copy of above this..............................day of May, 1921.

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Attorneys for Defendant in Error.